

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH TURNER, Personal Representative
of the Estate of VICTOR BRYANT, Deceased,

UNPUBLISHED
August 25, 2005

Plaintiff-Appellee,

v

No. 260803
Wayne Circuit Court
LC No. 04-404970-NI

LEE RICHARDS,

Defendant-Appellant,

and

CITY OF GARDEN CITY,

Defendant.

Before: Cooper, P.J., and Fort Hood and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant Lee Richards appeals as of right the trial court's order denying summary disposition in this governmental immunity case. We reverse.

Richards, an employee of defendant City of Garden City, was assigned to assist with the repair of a broken water main on Middlebelt Road. The repair site was located in the curb lane of the northbound side of the road, and was marked with reflective cones and flashing arrows. Richards pushed sand into the hole in the road with a front-end loader. When he finished that task, he parked the loader in the middle turn lane, and activated its headlights and emergency flashers. Several minutes later Richards was leveling the sand with a backhoe when he heard a crash, and saw that a northbound van had struck the loader. Plaintiff's decedent suffered severe injuries in the crash and died four days later.

Plaintiff filed a wrongful death action alleging liability against the City under the motor vehicle exception to governmental immunity, MCL 691.1405, and alleging that Richards' act of parking the loader in the road constituted gross negligence. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). They argued that the motor vehicle exception was inapplicable in this case because the loader was not a motor vehicle and because

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

the loader was not being operated at the time the accident occurred. It was further alleged that Richards' conduct did not constitute gross negligence as that term is defined by MCL 691.1407(2)(c). The trial court granted summary disposition on behalf of the City on the ground that the loader was not a motor vehicle for purposes of the motor vehicle exception, but denied summary disposition with regard to Richards, concluding that a question of fact existed as to whether his conduct was grossly negligent.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). Governmental employees are immune from liability for injuries they cause during the course of their employment if they are acting within the scope of their authority, if they are engaged in the discharge of a governmental function, and if their "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2). Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). To be the proximate cause of an injury, the gross negligence must be "the one most immediate, efficient, and direct cause" preceding the injury. *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). Evidence of ordinary negligence does not create a question of fact regarding gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

We reverse the trial court's decision denying summary disposition with regard to plaintiff's claim against Richards. Richards parked a front-end loader in the middle lane of the road. The statutory prohibition against blocking or obstructing the normal flow of traffic does not apply to the maintenance of public utility facilities. MCL 257.676b(1). Even assuming arguendo that MCL 257.676b(1) imposed a duty on Richards not to block the road, the presumption arising from the violation of a statutorily-imposed duty is one of ordinary negligence only. *Poppen v Tovey*, 256 Mich App 351, 358; 664 NW2d 269 (2003). Evidence of ordinary negligence does not raise a question of fact regarding gross negligence. *Maiden, supra*. Furthermore, the undisputed evidence showed that after Richards parked the loader, he activated its headlights and emergency flashers to make it more visible. We conclude that reasonable minds could not disagree that the allegations against Richards failed to demonstrate that he acted with "a substantial lack of concern for whether an injury result[ed]," and thus did not constitute gross negligence. MCL 691.1407(7)(a).

Furthermore, we conclude as a matter of law that Richards' conduct did not constitute the proximate cause of decedent's fatal injuries. Although the loader occupied the middle lane, the northbound lane immediately next to the middle lane was unobstructed. The deposition testimony of a witness established that decedent's van moved into the middle lane from the unobstructed lane, and apparently made no effort to slow down or to avoid the loader. Moreover, a physician's affidavit established that decedent suffered a stroke while driving on the night of the accident, and that the stroke caused decedent's van to collide with the loader. Under the circumstances, Richards' actions were not "the" proximate cause of decedent's fatal injuries. *Robinson, supra*. Richards was entitled to summary disposition.

Reversed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs